

AGREEMENT TO MEDIATE

Date:

Parties:

Mediator: **CAROLE SMITH**

CONTEXT

- A. The dispute referred to in Schedule 1 has arisen between the parties (“the Dispute”).
- B. The parties wish to resolve the Dispute.
- C. The mediator has agreed to help them to do so on the terms which follow.

AGREEMENT

Appointment and role of the mediator

1. The parties appoint the mediator to mediate the Dispute in accordance with the terms of this agreement, and the mediator accepts the appointment.
2. The mediator will help to identify the issues between the parties, to develop options for resolution of those issues, explore the usefulness of each option, and try and reach an agreement that accommodates the parties’ interests.
3. The mediator will not make a decision for the parties, impose any outcome on the parties, or undertake responsibility for advising any party. Any comments or recommendations by the mediator are not intended to be relied upon as legal and/or professional advice.

4. The mediator is an independent intermediary and not an advocate for any party. The mediator will act impartially, fairly and objectively and treat each party in an even-handed way.
5. By accepting the appointment, the mediator confirms that to her knowledge, she has no interest in the Dispute, nor has she had any relevant prior dealings with any of the parties in relation to the Dispute.

Co-operation of the parties

6. The parties will do all that they reasonably can in a good faith attempt to settle the Dispute.
7. Each party will comply with the reasonable requests of the mediator, including requests for the provision of documents and the disclosure of information, and directions of the mediator in relation to the conduct of the mediation.
8. The mediator may meet with the parties and/or any of the parties' representatives jointly and/or separately as the mediator determines.

Authority to settle and representation at the mediation

9. Each party will have in attendance at the mediation a person or persons who has or have full authority to settle the Dispute or, if that is not reasonably practicable, a person who is able, during the course of the mediation, to obtain authority to settle the Dispute.
10. Each party may, with the consent of the mediator and other parties, attend the mediation with one or more persons to assist and advise the parties. All such persons will be required to sign the confidentiality provision contained in Schedule 2 to this agreement.

What the mediation comprises of

11. The mediation shall comprise:
 - (i) All communications between any party or parties and/or their representatives on the one hand, and the mediator on the other in connection with the mediation process established under this agreement;
 - (ii) Any and all preliminary conferences, whether by telephone or in person, and the mediation meeting or meetings;
 - (iii) Any and all steps taken, and documents prepared, exchanged or provided solely in preparation for, or at, such mediation meeting(s); and

- (iv) Any and all subsequent steps taken for the purpose of achieving a legally binding settlement agreement arising out of the mediation meeting(s).

Confidentiality

12. The mediation is a “without-prejudice” process and is confidential. There will be no disclosure outside the mediation of any information, or documentation disclosed, or of any of the exchanges between the parties and/or the parties’ representatives and/or the mediator, during the mediation, subject only to the following exceptions:
 - (i) Where required to prove any settlement agreement reached as a result of the mediation, and/or to establish the meaning and/or validity of such an agreement;
 - (ii) Where disclosure is for the limited purpose of obtaining professional advice (and only after obtaining the proposed adviser’s agreement to maintain the confidentiality of the disclosed material);
 - (iii) Where disclosure is to a person within that party’s legitimate field of intimacy (and only after obtaining that person’s agreement to maintain the confidentiality of the disclosed material);
 - (iv) Where disclosure is required to prevent the safety of any person from being endangered; and/or
 - (v) Where disclosure is required by law. This includes, in cases where there is already litigation between the parties, documents which would in any event have been discoverable, or have been required to be served, in that litigation.
13. If the mediator receives information or documentation from one party or that party’s representative in private or that is intended to be confidential, she will not disclose it to any other party or the other party’s representative without the consent of the party or the party’s representative who has provided it.
14. If a party produces a document at the mediation that would otherwise be privileged from production or from admission into evidence, that party does not waive that privilege by producing the document.

Recording of settlements

15. In order for any settlement to be binding, it must be in writing. Where a party or parties are not legally represented in the mediation, or do not have access to legal advice at the time of agreement, they may choose to instead enter into a non-binding note recording the essential terms agreed before they leave the mediation meeting. In that situation, it is expected that a binding settlement agreement will be

drawn up by the parties' legal representatives and executed as soon as possible after the mediation meeting.

16. The mediator may assist the parties to draw up a settlement agreement in the mediation meeting if they are not legally represented, but on the condition that the parties accept that the mediator does not guarantee that any such settlement agreement will, in fact, be legally binding.

Termination

17. A party may terminate the mediation at any time after consultation with the mediator.
18. The mediator may terminate the mediator's involvement in the mediation at any time after consultation with the parties.
19. The mediation will otherwise be terminated by execution of the written settlement agreement referred to at clauses 15 and 16 above.
20. Termination shall not relieve the parties from their obligation to pay the mediator's fees and expenses.

Costs of the mediation

21. The mediator's fee for preparing for the mediation and attending a day of mediation or any part thereof (unless a half day mediation has been agreed) will be \$4,000 plus GST and disbursements. The fee for a half day mediation is \$2,000 plus GST and disbursements. Disbursements may consist of catering costs for a full day mediation, and accommodation if the mediation lasts for more than one day outside of Auckland.
22. There is no extra charge for the venue if the parties are happy to mediate at 48 Shortland Street in Auckland.
23. Unless the parties agree otherwise, they will share equally in all the fees and costs of the mediation. Where the parties are legally represented, costs are payable within 14 days of invoice. Unrepresented parties must pay their share of the mediator's fee in advance of the mediation meeting.
24. Irrespective of the outcome of the mediation, the parties will be jointly and severally liable to pay the mediator's fees and disbursements.

Exclusion of liability and indemnity

25. The parties agree that the mediator will not be liable to any party for any act or omission in the performance of the mediator's duties and obligations under this

agreement, unless the act or omission is fraudulent.

26. The parties, together and separately, indemnify the mediator against any claim for any act or omission in the performance of the mediator's duties under this agreement, unless the act or omission is fraudulent.

Party and mediator execution (if signing on behalf of a company please state in what capacity you have authority)

Signed by:

Name: Carole Smith

Address: FortyEight Shortland Barristers, Level 34 Vero Centre, 48 Shortland Street, Auckland 1010

Occupation: Mediator

Signed by:

Name:

Address:

Occupation:

Signed by:

Name:

Address:

Occupation:

Schedule 1

Description of Dispute including title and number of any related legal proceedings

Schedule 2

Confidentiality agreement by non-party attendees (including Counsel)

The undersigned undertake that in consideration of their attendance at the mediation referred to in the foregoing document, they will not disclose to any person not present at the mediation, nor use, nor give evidence about, nor call any witnesses or produce documents as to any communications or information made or furnished during the mediation, subject only to the following exceptions:

- (i) Where required to prove any settlement agreement reached as a result of the mediation, and/or to establish the meaning and/or validity of such an agreement;
- (ii) Where disclosure is required to prevent the safety of any person from being endangered;
- (iii) Where disclosure is required by law; or
- (iv) Where disclosure is necessary within the organisation and legitimate field of intimacy of the party on whose behalf or at whose request the non-party is present at the mediation, including the advisers and insurers of that party, provided always that such disclosure will only be on the same basis of confidentiality.

Non-party attendee 1: _____

Print name:

Non-party attendee 2: _____

Print name:

Non-party attendee 3: _____

Print name:

Non-party attendee 4: _____

Print name: